

1 Jon M. Sands
2 Federal Public Defender
3 Kelly L. Culshaw (OH Bar No. 0066394; CA No. 304778)
4 Nicole List (HI Bar No. 10077)
5 Nathan A. Maxwell (AZ Bar No. 033838)
6 Assistant Federal Public Defenders
7 850 W. Adams St, Suite 201
8 Phoenix, Arizona 85007
9 kelly_culshaw@fd.org
10 nicole_list@fd.org
11 nathan_maxwell@fd.org
12 Telephone: (602)382-2816
13 Facsimile: (602) 889-3960

14 *Counsel for Petitioner*

15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF ARIZONA**

17 Murray Hooper,
18 Plaintiff,
19 v.
20 Mark Brnovich, et. al.,
21 Defendants.

No. 2:22-cv-01923-SMM

DEATH-PENALTY CASE

**EMERGENCY MOTION FOR
TEMPORARY RESTRAINING
ORDER OR PRELIMINARY
INJUNCTION AND
MEMORANDUM IN SUPPORT**

**Execution scheduled for
November 16, 2022**

22
23
24 Plaintiff-Petitioner Murray Hooper, having filed his Complaint in the above-
25 captioned case, moves pursuant to Federal Rule of Civil Procedure 65(a), for a
26 preliminary injunction and/or a temporary restraining order and/or stay order
27 preventing the Arizona Department of Corrections, Rehabilitation and Reentry
28 (“ADCRR”) from executing Plaintiff-Petitioner without first providing him with

1 DNA and fingerprint testing that could exonerate him. Plaintiff-Petitioner seeks
2 injunctive relief to prevent Defendant-Respondents from executing him and
3 depriving him of his rights under the First, Eighth, and Fourteenth Amendments
4 and 42 U.S.C. § 1983, and without proper adjudication of the claims brought in the
5 concomitant lawsuit.

6 On November 10, 2022, Plaintiff-Petitioner filed an action for declaratory
7 and injunctive relief pursuant to 42 U.S.C. § 1983 requesting that this Court issue a
8 declaratory judgment that A.R.S. §§ 13-4241 and 13-4240, as applied, violate his
9 rights under the First, Eighth, and Fourteenth Amendments.

10 Temporary relief is necessary because the Attorney General’s Office opposes
11 testing and any stay of execution despite the powerful evidence available for
12 forensic testing, which would cast doubt upon Plaintiff-Petitioner’s conviction and
13 would likely point to someone else as the true perpetrator.

14 In considering a request for a stay of execution, this Court considers “not
15 only the likelihood of success on the merits and the relative harm to the parties, but
16 also the extent to which the inmate has delayed unnecessarily in bringing the claim.”
17 *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004). The claims Plaintiff-Petitioner
18 raises are substantial and likely meritorious: the denial of DNA and fingerprint
19 testing will prevent identification of the true perpetrator and result in the execution
20 of an innocent man. This motion is supported by the accompanying memorandum.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. Introduction**

23 The Supreme Court made it clear in *Barefoot v. Estelle*, 463 U.S. 880 (1983),
24 *superseded on other grounds by* 28 U.S.C. § 2253(c), that a stay should be granted
25 when necessary to “give non-frivolous claims of constitutional error the careful
26 attention that they deserve.” 436 U.S. at 888. When a court cannot “resolve the
27 merits of [a claim] before the scheduled date of execution,” a stay must be granted.
28 *Id.* at 889. It is axiomatic that a court may grant a stay of execution if the moving

1 party establishes that: (1) he has a strong likelihood of success on the merits; (2) he
2 will suffer irreparable injury unless the injunction issues; (3) the balance of
3 hardships tips in his favor; and (4) if issued, the injunction would further the public
4 interest. *Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005); *see also*
5 *Glossip v. Gross*, 576 U.S. 863, 875-77, *reh'g denied*, 136 S. Ct. 20 (2015) (mem.)
6 (stating that plaintiff seeking preliminary injunction must show “that he is likely to
7 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
8 preliminary relief, that the balance of equities tips in his favor, and that an injunction
9 is in the public interest”); *see also Nken v. Holder*, 556 U.S. 418, 433–34 (2009)
10 (citation omitted); *In re Campbell*, 750 F.3d 523, 535 (5th Cir. 2014). In a capital
11 case, courts “must be particularly certain that the legal issues have been sufficiently
12 litigated, and the criminal defendant accorded all the protections guaranteed him by
13 the Constitution of the United States.” *O’Bryan v. Estelle*, 691 F.2d 706, 708 (5th
14 Cir. 1982) (citation omitted). Consideration of these factors in Hooper’s case
15 dictates a finding that a stay of execution is warranted.

16 **II. Equitable principles weigh in favor of staying Plaintiff-Petitioner’s** 17 **execution**

18 **A. There is a likelihood of success on the merits**

19 The Arizona courts have deprived Plaintiff-Petitioner of due process by
20 refusing to apply Arizona’s new post-conviction forensic testing statutes. He has a
21 strong likelihood of success on the merits of his § 1983 lawsuit.

22 For the past 40 years, the State has told a story contingent on a specific series
23 of events that allegedly occurred on December 31, 1980. The State has relied on
24 evidence that Plaintiff-Petitioner, William Bracy, and Edward McCall—and no one
25 else—barged into the Redmond home and that Plaintiff-Petitioner led Mrs.
26 Redmond to a closet in the home before taking her to the bedroom and binding the
27 hands of all three victims with tape. (Tr. 12/21/82 at 33–34; Tr. 11/30/82 p.m. at
28 45.) The State has asserted that all three of the victims were shot, and that Plaintiff-

1 Petitioner selected, alone handled, and specifically used a kitchen knife to cut Mr.
2 Redmond's throat. (*See* Tr. 11/17/82 at 47–48; Tr. 11/23/82 at 44; Tr. 11/24/82 at
3 78.) The State also asserted the adhesive tape used to bind Mrs. Redmond was
4 bought and used exclusively for this crime. (Tr. 12/21/82 at 29, 33–34, 117.) Every
5 accusatory witness who was alleged to have information about this crime testified
6 to this specific series of events occurring in exactly the same way. The principal,
7 bought-and-paid-for accusatory witnesses; i.e., Arnie Merrill and George
8 Campagnoni denied participation in the crime and being inside the Redmond home.

9 Now, the ability to test those key items—the knife and tape—which the
10 interested witnesses claimed Hooper touched without gloves, may be tested. As
11 explained below, that testing will show that every witness who testified against
12 Plaintiff-Petitioner did so falsely, and also demonstrate that the already troubling
13 eyewitness identification of Mrs. Redmond was mistaken. No conviction could
14 have been obtained in the first place, if this is what the physical evidence shows.

15 Hooper is likely to succeed on his § 1983 action because the deprivation of
16 his constitutional rights is apparent. Arizona's forensic testing statutes mandate
17 testing, even if the trial evidence was overwhelming, so long as forensic testing
18 holds out just a reasonable probability that new evidence, if exculpatory, would
19 have led to a different outcome. *See* A.R.S. § 13-4241; *see also* A.R.S. § 13-4240.

20 As explained in Plaintiff-Petitioner's complaint, the superior court construed
21 its own statutes to deprive him of due process and the testing he should have been
22 permitted under its statute. The superior court ignored that testing in Plaintiff-
23 Petitioner's case may finally identify the actual offenders—including the same paid
24 government witnesses or their cohorts who framed Plaintiff-Petitioner in the first
25 instance.

26 As such, A.R.S. §§ 13-4241 and 13-4240, as construed by the Arizona courts,
27 deprived Hooper of procedural due process. *See Foucha v. Louisiana*, 504 U.S. 71,
28 79–80 (1992) (failure to provide relief for a possibly innocent prisoner amounts to

1 an “arbitrary” abridgement of the “[f]reedom from bodily restraint [that] has always
2 been at the core of the liberty protected by the Due Process Clause”). When a state
3 creates a judicial remedy, access to that remedy must be fairly afforded. *See Bounds*
4 *v. Smith*, 430 U.S. 817, 828 (1977). Where, as here, the state fails to provide access
5 to evidence needed to litigate claims of innocence, it imposes an intolerable barrier
6 to the right of access to courts. *See Wade v. Brady*, 460 F. Supp. 2d 226, 250 (D.
7 Mass. 2006) (“Denying prisoners access to potentially exculpatory DNA evidence
8 limits meaningful access to the courts in even more profound terms than denying
9 access to a law library or attorney.”). The Fifth Circuit has found an access-to-courts
10 violation when state actors impeded a potential litigant’s access to evidence. *See*
11 *Ryland v. Shapiro*, 708 F.2d 967, 971-76 (5th Cir. 1983). And “DNA testing has an
12 unparalleled ability both to exonerate the wrongly convicted and to identify the
13 guilty.” *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55
14 (2009). Here, Plaintiff-Petitioner has been denied access to critical evidence—such
15 as DNA present on the knife used to commit the murder, and the fingerprints lifted
16 from the scene—under extraordinary circumstances.

17 Because Plaintiff-Petitioner’s § 1983 complaint demonstrates the superior
18 court’s conclusion that it would have made no difference, had new testing
19 demonstrated that Plaintiff-Petitioner had been framed by the paid and perjurious
20 witnesses, whose fingerprints place them inside the residence, amounts to an abject
21 violation of the statute and due process, and sets a dangerous precedent that may
22 result in the execution of an innocent man.

23 **II. Plaintiff-Petitioner Will Suffer Irreparable Harm Absent a Stay and the** 24 **Balance of Hardships Tips in his Favor**

25 A stay of execution is necessary because otherwise Plaintiff-Petitioner will
26 be executed in violation of his rights to due process and the freedom from cruel and
27 unusual punishment under the federal and Arizona Constitutions. U.S. Const.
28 amends. V, VI, VIII, XIV. That harm is clear, serious, and irreversible. Moreover,

1 a stay of execution in this case will not substantially harm the State of Arizona.
2 Plaintiff-Petitioner seeks merely to maintain the status quo until this action can be
3 resolved on its merits. This is the very purpose of a preliminary injunction. *See*
4 *Tanner Motor Livery, Limited v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963) (“It
5 is so well settled as to not require citation of authority that the usual function of a
6 preliminary injunction is to preserve the status quo ante litem pending a
7 determination of the action on the merits.”). Even if the stay or injunction is granted
8 in error, and Plaintiff-Petitioner’s § 1983 complaint ultimately denied, then the stay
9 may be lifted and the State can expeditiously proceed towards a new execution date.
10 Common sense dictates that this factor weighs in Hooper’s favor.

11 **A. Stay Furthers the Public Interest**

12 Finally, a stay here would further the public interest, which is served by
13 enforcing constitutional rights and by the prompt and accurate resolution of disputes
14 regarding constitutional rights. *See Cooley v. Taft*, 430 F. Supp. 2d 702, 708 (S.D.
15 Ohio 2006) (“[T]he public interest has never been and could never be served by
16 rushing to judgment at the expense of a condemned inmate’s constitutional
17 rights.”).

18 Plaintiff-Petitioner acknowledges that the State has a “strong interest in
19 proceeding with its judgment.” *Beardslee*, 395 F.3d at 1068. However, its
20 retributive purpose for imposing capital punishment is called into question where
21 an individual’s innocence could be proven through mandatory forensic testing. The
22 State itself and the citizens of Arizona have a compelling interest in ensuring that
23 such an offense does not occur.

24 When Plaintiff-Petitioner initially filed his request in September for DNA
25 and fingerprint testing, there was ample time to conduct the requested DNA and
26 advanced forensic testing. DPS estimated it could be completed in roughly two
27 weeks. When Plaintiff-Petitioner filed his Petition for Special Action before the
28 Arizona Supreme Court, there was still time to conduct that testing. That window

1 has now closed—Plaintiff-Petitioner has six days until his scheduled execution.
2 Minimally, a brief stay of execution is warranted to allow this important testing.¹

3 This Court has the inherent authority to do “all things reasonably necessary
4 for the administration of justice.” *Schavey v. Royston*, 448 P.2d 418, 419 (Ariz. Ct.
5 App. 1968). That power flows both from the Arizona Constitution, *see* Ariz. Const.
6 art. VI, § 3 and from its inherent power as an appellate court to supervise court
7 operations. *See Arpaio v. Davis*, 210 P.3d 1287, 1291 (Ariz. Ct. App. 2009).
8 Exercise of that authority to stay these proceedings for a limited period is
9 appropriate and necessary to ensure the fair administration of justice.

10 **III. No Unnecessary Delay**

11 Plaintiff-Petitioner has steadfastly maintained his innocence for over forty
12 years. On April 29, 2022, Kelly Culshaw was assigned to Plaintiff-Petitioner case
13 after his long-time counsel left the Federal Public Defender’s office (FPD). (ECF
14 No. 177). Culshaw began working at the FPD on March 28, 2022. From March to
15 July, Culshaw’s work had been focused on compliance with a statutory deadline in
16 *Gomez v. Shinn*, No. CV-21-01529-PHX-MTL, a capital habeas case in the United
17 States District Court for the District of Arizona. Four days after Mr. Gomez’s
18 federal habeas petition was filed in federal district court, the State filed its Motion
19 to set a briefing schedule for a warrant of execution in Plaintiff-Petitioner case.
20 (Mot. to Set Briefing Schedule for Mot. for Warrant of Execution, *State v. Hooper*,
21 No. CR 83-0044-AP (Ariz. July 19, 2022)). Since the filing of that motion,
22 Culshaw, as well as other newly assigned undersigned counsel, have spent many
23 hours trying to acquaint themselves with the legal issues in Plaintiff-Petitioner’s

24
25 ¹ This stay is also necessary given the State’s recent eleventh-hour disclosure that
26 Marilyn Redmond, prior to selecting Plaintiff-Petitioner out of a live lineup, could
27 not identify Plaintiff-Petitioner in a paper lineup. (Exhibits 1 & 2 at 11, MCAO
28 letters.) The certainty of Mrs. Redmond’s identification, given her inability to
identify Plaintiff-Petitioner in a paper lineup, is directly undermined and warrants
granting this testing and providing sufficient time to be conducted.

1 case, and preparing for and presenting a clemency hearing.

2 Plaintiff-Petitioner's case file comprises nearly 100 banker's boxes. Counsel
3 reviewed the case file for issues as quickly as possible and filed a motion with the
4 Maricopa County Superior Court on September 22, 2022, to request DNA and
5 fingerprint testing under A.R.S. §§ 13-4241 and 13-4240. On October 19, 2022, the
6 Maricopa County Superior Court held an oral argument on the motion. (Minute
7 Entry, *State v. Hooper*, No. CR-0000-121686 (Maricopa Cnty. Super. Ct. Oct. 25,
8 2022)). When the superior court filed its denial of Plaintiff-Petitioner's requested
9 testing October 24, 2022, (Minute Entry, *State v. Hooper*, No. CR-0000-121686
10 (Maricopa Cnty. Super. Ct. Oct. 24, 2022)), counsel promptly filed a Special Action
11 in the Arizona Supreme Court on October 31, 2022, requesting review of the
12 Maricopa County Superior Court's denial. (Petition for Special Action, *Hooper v.*
13 *Hon. Jennifer Green*, No. CV-22-0259-SA (Ariz. Oct. 31, 2022)). (Exhibit 3.) After
14 the response, the reply, and an amicus brief were filed, the Supreme Court denied
15 testing on November 10, 2022. (See Exhibits 4–6.)

16 Significantly, on the date Plaintiff-Petitioner filed his testing motion, there
17 was sufficient time to complete the requested testing. DPS advised undersigned
18 counsel that it would take roughly one week to conduct DNA testing, and roughly
19 one additional week to draft its report; the fingerprint testing could occur much
20 more quickly. There was sufficient time to complete the requested testing when the
21 superior court denied Plaintiff-Petitioner's request on October 24, 2022. Time
22 remained to complete the requested testing when Plaintiff-Petitioner filed his
23 special action in the Arizona Supreme Court on October 31, 2022. That window has
24 since closed because the State has adamantly opposed using advanced forensic
25 techniques to ensure that they are, in fact, executing the perpetrator.

26 **IV. Conclusion**

27 For the foregoing reasons, Hooper respectfully requests that this Court (1)
28 issue a stay, enjoining Hooper's execution which is currently scheduled for

November 16, 2022 at 10:00 a.m.; and either (2) order the state courts to grant the testing of both fingerprints and DNA to occur, or (3) permit full briefing and argument on his Forensic Testing claim.

Respectfully submitted this 10th day of November, 2022.

Jon M. Sands
Federal Public Defender
District of Arizona

Kelly L. Culshaw
Nicole List
Nathan A. Maxwell

s/Kelly L. Culshaw
Counsel for Petitioner

PROOF OF SERVICE

I hereby certify that on November 10, 2022, I electronically filed the foregoing Emergency Motion for Temporary Restraining Order or Preliminary Injunction and Memorandum in Support and its corresponding exhibits with the Clerk's Office by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Daniel Juarez